85-205

No. A-932

Supreme Court, U.S.
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CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT ASMUSSEN, ET AL., Appellants

v.

CITY OF AUSTIN, TEXAS, Appellee

v.

HON. JIM MATTOX, ATTORNEY GENERAL OF TEXAS, Appellee

ON APPEAL FROM THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

# JURISDICTIONAL STATEMENT

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## (a) Questions Presented on Appeal

### Question 1

In this case, an intermediate Texas appellate court dismissed Appellants' cause of action on the merits because Appellants failed to post a prospective damage bond.

**Question:** Is a state statute under which court access for defense of the right to vote is withheld because of the failure to post a $2 million prospective damage bond invalid on grounds of repugnancy to the Equal Protection guarantees of the Fifth and 14th Amendments to the Constitution of the United States?

Appellants expressly include in this question the subsidiary questions in which: (A) an indigent seeks court access and (B) the access sought includes a statutory right to appellate review.

## Question 2

The trial court did not require Appellants post a prospective damage bond, and Appellee City of Austin appealed that "interlocutory" decision without a request for findings of fact and conclusions of law.

**Question:** Do appellate proceedings violate litigants' Due Process rights under the 14th Amendment to the Constitution of the United States, if the appellate Court:

(A) reverses a presumed trial court finding that litigants made a "temporary injunction" evidentiary showing, though the record shows only that litigants did not make the evidentiary showing required to prevail on the merits;

(B) finds, as a matter of law, the present value of prospective damages not found by the trial court, though the only evidence in the record regarding this measure of damanges is that a present value calculation might show damages not to exist; and

(C) orders its opinion not be published and, hence, not be precedential, though the opinion interprets a statute of state-wide application and resolves a constitutional question previously deferred by the state's highest court?

## (b) List of Parties

(i) Apellants here, Appellees in the interlocutory cause (#14,267) below, and Appellants in the cause on its merits (#14,302) below:

Robert Asmussen
Richard Burns
Charlotte Carl-Mitchell
Christine Crosby
William Thomas Crouse
Mary Eakin
Fred Ebner
Dan Harrison
Max Nofziger
Ray Reece
Robert L. Russell
William A. Simmons
Daryl Slusher
Phillip S. Blackerby
Smoot Carl-Mitchell
Bert Cromack
James R. Crosby
Sophie Dunn
Pat Eakin
Charlie Haney
Bettty Matau
James Pinedo
Joe Riddell
Regina Shults
Lanny Sinkin
Craig von Steiger

(ii) Appellees in the interlocutory cause below, not parties here:

Stephen Beers
Delora Frederickson
Rebecca Howard
Allison LaTouf
Michael McConnell
Heidi Gillette Sorenson
Jeffrey James Conn
Ruby Goodwin
Craig Jordan
Jere S. Locke
Kenneth Shepardson
Matthew Sorenson

(iii) Appellee here, Appellant in the interlocutory cause below, and Appellee in the cause on its merits below: City of Austin, Texas.

(iv) Appellee here, Appellee in the interlocutory cause below, and Appellee in the cause on its merits below: Honorable Jim Mattox, Attorney General of Texas.

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| Article VII, Section 11, Charter of the City of Austin, Texas | 13 |


Treatise


C. Dallas Sands, *Statutes and Statutory Construction* (1973) 30

## (d) Reference to Lower Reports and Opinions

The intermediate appellate court opinion in the interlocutory cause is unpublished; it is Appendix A. There is no intermediate appellate court opinion in the cause on its merits; the court's judgment is Appendix C. There are no written trial court findings of fact in the interlocutory cause; the interlocutory order is Appendix D. The trial court's findings of fact on the merits of the cause are Appendix E, and the judgment is Appendix F.

## (e) Jurisdictional Grounds

(i) The proceeding is one in which an intermediate Texas appellate court sustained the constitutional validity of art. 717m-1, sec. 8 (Tex. Rev. Civ. Stat.), and applied that statute to dismiss Appellants' cause of action. The Attorney General of Texas was a mandatory, but neutral, party in all proceedings below.

(ii) The direct harm to Appellants arises from dismissal of their cause on its merits (14,302). That dismissal arises from the appellate court's order in the interlocutory cause (14,267).

| Action | Date (interlocutory cause, #14,267) | Date (cause on the merits, #14,302) |
|---|---|---|
| intermediate appellate court judgment | 10/31/84 | 11/14/84 |
| denial of motion for rehearing | 11/28/84 | 12/12/84 |
| state supreme court writ of error denial | ----------2/6/85---------- | |
| state supreme court motion for rehearing denial | ----------3/27/85---------- | |

Appellants' SECOND NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES was filed June 12, 1985, with the Court of Appeals for the Third Supreme Judicial District of Texas.

This Court has appellate jurisdiction over Question 1, the Equal Protection question, by virtue of 28 U.S.C. 1257(2). This Court has certiorari jurisdiction over Question 2, the Due Process question, by virtue of 28 U.S.C. 1257(3) and 28 U.S.C. 2103. Jurisdiction over the Due Process question is further sustained by Vachon v. New Hampshire, 414 U.S. 478 (1974); Wood v. Georgia, 450 U.S. 261 (1981); and 28 U.S.C. 2106.

## (f) Constitutional, Statutory, and Charter Provisions Involved

(i) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States,
Amendment XIV, Section 1.

(ii) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.

Constitution of the United States, Amendment V.

(iii) The principal state statute involved, art. 717m-1, sec. 8 (Tex. Rev. Civ. Stat.), is lengthy. Sections 8 and 9 are set out in Appendix L. The statute authorizes a public agency initiating a "bond validation" suit to move the trial court hold a hearing and require defendants/intervenors post a prospective damage bond. The most pertinent language reads:

> Unless at the hearing on the motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities, the court shall grant the motion of the public agency and in its order the court shall fix the amount of the bond to be posted by the opposing party or intervenor in an amount found by the court to be sufficient to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition....

In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court.

art. 717m-1, sec.8,
Tex. Rev. Civ. Stat.

(iv) The city shall have power to borrow money for the purpose of constructing, purchasing, improving, extending or repairing of public utilities, recreational facilities or facilities for any other self liquidating municipal function not now or hereafter prohibited by any general law of the state, and to issue revenue bonds to evidence the obligation created thereby. Such bonds shall be a charge upon and payable solely from the properties, or interest therein, acquired and the income therefrom, and shall never be a debt of the city. All revenue bonds issued by the city shall first be authorized by a majority of the qualified electors voting at an election held for such purpose. The council shall have authority to provide for the terms and form of any purchase agreement, contract, mortgage, bond or document desired or necessary for the issuance of revenue bonds and the acquisition and

operation of any such property or interest.

Art. VII, Sec. 11, Charter of the City of Austin, Texas

## (g) Concise Statement of the Case

**Evolution of the case to date**

Citizens of Austin, Texas, have reserved to themselves the right to vote on certain of the City's fiscal decisions. In particular, their home-rule charter requires voter approval prior to the City's sale of revenue bonds.

On May 10, 1984, a majority of the Austin City Council voted to sell, without voter approval, $605 million of revenue bonds to fund construction of the South Texas Nuclear Project. (This vote was the second on the sale of these bonds; the first occurred approximately two months earlier, but suffered from various procedural defects.)

Following the first vote, the City had initiated in state district court a "bond validation" suit under art. 717m-1, Tex. Rev. Civ. Stat. Appellants were among 38 citizens who answered the suit and challenged the validity of the bonds. The Attorney General of Texas was a mandatory party to the litigation, but expressly remained neutral. #14,267 Tr. 15 and 4/9/84 S.F. 8-10.

The City moved that the 38 citizens be required to post a bond to secure the City against potential delay-associated losses. Section 8 of Texas's bond validation statute permits such a motion. A hearing on the motion was held April 9, 1984.

The hearing lasted most of the day, but its gravamen was: (1) quantifiable prospective losses to the City, if any, would accrue exclusively because rising long-term interest rates would increase the City's borrowing costs and (2) these losses, depending

on ones assumptions, could range up to $56 million (nominal dollars) on a delayed $200 million bond sale. 4/9/84 S.F.75-76, 84, and 100. The testimony on losses came from two witnesses, one of whom worked for the City's bond advisor and the other of whom worked for the firm trying to sell the City's share of the nuclear plant; the latter witness's firm prepared the loss projecitons.

The judge denied the City's motion, citing as a sufficient reason insufficient evidence of delay attributable to the citizens. #14,267 Tr. 68. The City did not appeal.

On May 25, 1984, a hearing was held before the same judge on the merits of the citizens' challenge to the validity of the bonds. The hearing was a legal debate as to whether the city charter voter approval requirement is or is not inconsistent with a state statute, art. 1112, Tex. Rev. Civ. Stat. Both parties agreed the bonds in question are described by a proviso in the statute. The disagreement was (and is) as to whether the proviso (1) exempts the bonds from the classes of securities addressed by the statute or (2) implies for the bonds a law opposite to that set out for securities otherwise addressed by the statute. Neither side introduced factual evidence in support of its interpretation. (The City attempted to introduce, though not for the truth of their contents, interrogatories from which support for its position might be inferred; the judge excluded these on multiple grounds. 5/25/84 F.S. 14-22.) At the close of the hearing, the judge ruled for the City (i.e., found "inconsistency").

The City again moved that the citizens be required to post a prospective damage bond. The same

judge held a hearing June 6, 1984. It was brief and informal. The attorney for the citizens called to the court's attention the indigent Appellant's Affidavit of Inability to Post Bond. 6/6/84 S.F. 4 and 5. Though not clearly reflected in the statement of facts, the parties assumed the judge would rely on facts and arguments from the previous hearings.

On July 5, 1984, the judge denied the City's second damage bond motion. He signed the judgment on the merits the same day.

The City appealed the denial of its second damage bond motion. It did not request or receive trial court findings of fact and conclusions of law. It had prepared a statement of facts on the entire June 6th hearing and a statement of facts on the April 9th hearing that included everything except the oral arguments, which may never have been recorded. It did not have prepared a statement of facts on the May 25th hearing.

Appellants appealed the judgment on the merits. They requested and received findings of fact and conclusions of law. The indigent Appellant filed an Affidavit of Inability to Pay Costs, which became conclusive when it was not contested. Rule 355(e), Tex. Rules Civ. Proc.

The Court of Appeals for the Third Supreme Judicial District of Texas set an expedited oral argument on the City's appeal. The appellate court reversed the trial court's denial of a prospective damage bond and ordered the citizens post a $2 million bond. The citizens were unable to do so within the statutory 10-day period, so the appellate court dismissed Appellants' appeal on the merits.

Appellants filed motions for rehearings on the appellate court's bond order and merits dismissal; each was denied. Appellants made a consolidated application to the Supreme Court of Texas for writs of error on the bond order and merits dismissal; the writs were denied, as were motions for rehearing. Appellants now perfect a consolidated appeal to this Court.

While Appellants' motion for rehearing was pending before the Supreme Court of Texas, the City of Austin solicited bids to sell a bond that included $76.8 million of the challenged $605 million revenue bond authorization. The day after the motion was denied, the City accepted a bid. Shortly thereafter, and after receipt of Appellants' notice of appeal to this Court, the then-mayor of Austin signed a "no-litigation" certificate for the bond, and the bond was delivered to the buyer. (The certificate is reproduced in Appendix M.)

**Raising the Federal Questions: Question 1**

Appellants were first harmed, in a way this Court may correct, at the intermediate appellate court level. (Appellants' Equal Protection claim had also been asserted -- and presumptively accepted -- at the trial court level.) At the intermediate appellate level in the interlocutory cause, Appellants, here, were Appellees. They initially had no occasion to file pleadings raising their Equal Protection claim. As the appellate court's opinion reflects, however, they did raise the claim, as to indigent court access, in their reply brief. There, Appellants cited Boddie v. Connecticut, 401 U.S. 371 (1971) and Harper v.

Virginia Board of Elections, 383 U.S. 663 (1966), as well as Mathews v. Eldridge, 424 U.S. 319 (1976).

In their motion for rehearing to the intermediate appellate court in the interlocutory cause, Appellants raised the Equal Protection claim with Point of Error No. 4:

> THIS COURT ERRED TO REJECT APPELLEE'S CONTENTION THAT AN INDIGENT MAY NOT CONSTITUTIONALLY BE REQUIRED TO POST AN ART. 717m-1, SEC. 8, DAMAGE BOND.

They elaborated on it in their supporting brief with, among other language, the following (at page 19):

> This Court (Opinion, pp. 6-7) rejected Appellees' contention that the 5th and 14th Amendments to the U.S. Constitution and Article I, Sections 3 and 19, of the Texas Constitution extend to indigents equal protection and due process ("due course of law") guarantees prohibiting imposition of damage bond obligations under art. 717m-1. This point of error objects to that rejection.

In their motion for rehearing to the intermediate appellate court on its dismissal of the

cause on its merits, Appellants raised their Equal Protection claim with Point of Error No. 3:

> THIS COURT ERRED TO DISMISS INTERVENORS' APPEAL IN THIS CAUSE, BECAUSE ART. 717m-1, TEX. REV. CIV. STAT., BOTH ON ITS FACE AND AS APPLIED, ABRIDGES INTERVENORS' FUNDAMENTAL CONSTITUTIONAL RIGHTS IN VIOLATION OF THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES AND TEXAS CONSTITUTIONS.

They elaborated upon it in more than four pages of the motion itself.

In their consolidated application for writs of error to the state's highest court, Appellants reasserted their Equal Protection claim with Point of Error No. 4:

> BECAUSE ART. 717m-1 UNNECESSARILY DIFFERENTIALLY JEOPARDIZES THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF INDIVIDUALS ON THE BASIS OF WEALTH, THE COURT OF APPEALS ERRED TO REJECT PETITIONERS' AND THE TRIAL COURT'S IMPLIED CONCLUSIONS THAT ART. 717m-1 VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE TEXAS AND U.S. CONSTITUTIONS.

Appellants elaborated upon it in seven pages of the application. Point of Error No. 4 was reiterated verbatim in Appellants' state supreme court motion for rehearing.

**Raising the Federal Questions: Question 2**

Appellants Due Process claim arose from the decision of the intermediate appellate court on the City's interlocutory appeal. In their motion for rehearing in that cause, Appellants' Point of Error No. 7 set up one of the circumstances now asserted in the Due Process claim:

> THIS COURT'S ORDER THAT ITS OPINION NOT BE PUBLISHED VIOLATES THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF BOTH THE UNITED STATES AND TEXAS CONSTITUTIONS.

The federal constitutional dimensions of the other two circumstances now asserted in the claim were less well-focused; the circumstances themselves, however, were explicitly called to the court's attention in the motion for rehearing (at pages 2 and 3):

> Failure to prevail on the merits is no indication of failure to make the lesser temporary injunction showing.

> In particular, there is no evidence of or of how to calculate the present value of prospective damages.

Appellants' brief in support of their motion elaborated on these circumstances at some length.

In their motion to the intermediate appellate court for rehearing of its dismissal of the cause on its merits, Point of Error No. 1 set up their Due Process claim:

> THIS COURT ERRED TO DISMISS INTERVENORS' APPEAL IN THIS CAUSE, BECAUSE THE PROSPECTIVE DAMAGE BOND ORDER WITH WHICH INTERVENORS FAILED TO COMPLY WAS ITSELF ISSUED IN VIOLATION OF THE PROCEDUREAL DUE PROCESS GUARANTEES OF THE UNITED STATES AND TEXAS CONSTITUTIONS.

In their consolidated application to the state supreme court for writs of error, Appellants explicitly called attention to two of the three circumstances complained of in their Due Process claim (at pages 13 and 15):

> With honest respect for the Court of Appeals, it is <u>not</u> undisputed that Petitoners failed to make the temporary injunction showing. They vigorously assert that they did. The fact that the trial court ruled against Petitioners on the

> merits does not indicate that Petitioners failed to make this showing. The temporary injunction showing is less than that required to prevail on the merits. Failure to make the greater showing does not indicate a similar failure to make the lesser showing.
>
> The only evidence in the record regarding the effect on damages of discounting to present worth is this testimony of Mr. Baxter (S.F. 100): [set out in the next section of this Jurisdictional Statement]. There is no evidence in either record of the means by which a net present worth calculation should be made or of the values one might assign to important calculation variables, such as the time value of money and future inflation rates.

Appellants did not initially complain to the Supreme Court of Texas of the intermediate appellate court's order that its opinion not be published.

In their final motion for rehearing, Appellants hoped to arrest the attention of the state's highest court with a terse, "common sense" exposition of the injustices they had suffered. That motion, to maintain technical compliance with appellate precedural rules, listed again the Points of Error asserted in the

application for writs of error. Its emphasis, however, was on three principles Appellants argued were fundamental to preserving liberties special to America -- principles Appellants saw threatened by proceedings in these causes.

One of the principles was: "The integrity of the legal system supersedes the damands of any particular case." Among the circumstances Appellants enumerated (at pages 10-12) as threatening this principle were the three presented in Appellants' Due Process claim:

> 2. The bond validation statute does not empower a court to impose on litigants a prospective damage bond, if litigants state a cognizable cause of action and produce evidence tending to support that cause of action . Petitioners did this, but the Court of Appeals imposed a prospective damage bond, anyway.
>
> 3. Courts of Appeals are not supposed to find, but only to "unfind," facts. Nonetheless, the Court of Appeals found $2 million to be the present value of potential prospective damages. It did this on a record in which the only testimony about the effect on damages of a present value calculation is that such a calculation might reveal the damages to be zero.
>
> 5. The Court of Appeals has ordered its opinion not be published. The practical effect of this is that Petitioners will be the only litigants ever bound by any new law

announced in the opinion. The opinion should be published, as it is the first to declare paupers subject to the prospective damage bond requirement (a question this court expressly did not address in Buckholts). The opinion also interprets a statute of state-wide applicability (art. 717m-1) and reflects a new practice regarding appellate fact finding.

**Conclusion on the Raising of Question 2**

The federal dimension of Appellants' Due Process claim was not as consistently well-focused in courts below as good practice dictates. Nonetheless, it was much better focused below and, certainly, is better focused in this Court than were claims recognized in Vachon v. New Hampshire, 414 U.S. 478 (1974) and Wood v. Georgia, 450 U.S. 261 (1981).

## (h) Substantiality of the Questions

The resolution of at least one of the questions is vitally important. However, each question is not so substantial as to require plenary consideration, briefs, and oral argument for its resolution. The Due Process question can be resolved without the resource commitment demanded by the Equal Protection question.

## Resolution of the Due Process Question

Section 8 of the bond validation statute conditions damage bond avoidance on an evidentiary showing that "in the judgment of the court would entitle" intervenors to a temporary injunction. Under this language, the wisdom of which Appellants do not defend, appellate review of trial court imposition or denial of a damage bond is review for abuse of discretion. The aggrieved party has an almost impossible burden: he or she must show the prevailing party either (1) had no legally cognizable cause of action or (2), if fact questions were involved, produced no credible evidence tending to support a cause of action. This threshold "temporary injunction" evidentiary showing is indisputably less than that required to prevail on the merits. Oil Field Haulers Assoc. v. Railroad Commission of Texas, 381 S.W.2d 183, 196 (Tex. 1964) and Southwestern

Greyhound Lines v. Railroad Commission of Texas, 99 S.W. 2d 263, 270 (Tex. 1936).

The record on which Appellee, here, must rely shows no more than that Appellants did not prevail on the merits (in the trial court).

[Because the City of Austin did not request or receive findings of fact and conclusions of law, the law presumes the trial court judge made findings and conclusions necessary to support his ruling. Goodyear Tire and Rubber Co. v. Jefferson Construction Co., 565 S.W. 2d 916 (Tex. 1978). Furthermore, the City did not take to the appellate courts a statement of facts on the hearing on the merits, nor did it have transcribed the oral argument from the only real hearing (April 9th) on the damage bond motions. The City, therefore, is legally estopped to argue the record does not support the presumed findings. Dresser Industries, Inc. v. Forscan Corporation, 641 S.W. 2d 311 (Tex. Civ. App.- Houston, 14th District, 1982, no writ history) and Davis v. Huey, 571 S.W. 2d 859 (Tex. 1978).]

The intermediate court of appeals was correct that present worth is the proper way to measure damages for purposes of setting the bond; the bond secures a potential payment that, were it made, would be made in dollars of present worth. The record of the April 9th hearing reflects volumes of speculation about what future damages might be -- all of it, sums of hypothesized annual interest penalties, measured in nominal dollars. The following is the only testimony in the record or, in fact, adduced concerning the present worth of potential future losses (4/9/84 S.F. 100):

Answer: ...."Look, you need $200,000,000," they say. [They ask,] "What happens if interest rates go up?" It is just arithmetic. But I have not put inflation factors in.

Question: In fact, if you did a present worth calculation, it might be cheaper to delay [the bond sale] a year, mightn't it?

Answer: That's -- You know, that's possible.

Putting aside the fact that interest rates have been declining throughout this litigation, there simply is no evidence in the record to support the $2 million figure found by the intermediate appellate court .

Ordering the opinion remain unpublished unfairly subjects Appellants alone to its vagaries.

**Resolution of the Equal Protection Question**

If this Court does not dispose of this case on the Due Process claim, full briefing and argument should be had on the Equal Protection claim. The balances involved in this latter claim are subtle. Application of the standard by which the claim should be evaluated will be subtle, also, given the facts (e.g. indigency and statutory right to appellate review) of this case.

It is clear the right to vote is fundamental. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) and Phoenix v. Kolodziejski, 399 U.S. 204 (1970). The challenged bond validation statute's categorization scheme is clearly under-inclusive; it

does not deter the frivolous, but very wealthy, litigant. As the intermediate court of appeals interpreted it, it is also clearly over-inclusive; it does deter the litigant who presents evidence tending to sustain a cause of action, but who is not very wealthy. The most important thing not clear, from this Court's decisions to date, is how to determine the constitutional validity of such a classification scheme. This one does not burden a fundamental right directly, but fatally burdens the only realistic way to defend that right.

**The Importance of a Resolution**

Which ever course of action this Court pursues, the decision of the lower court should not be allowed to stand. The bond validation statute is inherently dangerous. Its prospective damage bond provision, if applied at all, must be applied with extreme caution. Unlike litigants confronting a temporary injunction standard in the course of more conventional litigation, litigants confronting it under the bond validation statute risk never receiving consideration of the merits of their cases. At the least, this Court should let it be known that the laxity shown below in imposing the damage bond is unacceptable.

Furthermore, the merits of the dispute that gave rise to this appeal need to be resolved. This Court can not do that, but it can insure that a Texas appellate court does do that.

Austinites value the fiscal control they retain under their home-rule charter; they soundly defeated in January of this year a proposition to weaken (delegate) that control. Though Appellants might lose their case on its merits, they should not: statutory

limitations on the authority of a home-rule city are supposed to be unambiguously expressed [City of Sweetwater v. Geron, 380 S.W. 2d 550, 552 (Tex. 1964)], and statutes and city charters are supposed to be construed consistently with one another, if any reasonable construction to that end can be made [City of Beaumont v. Fall, 291 S.W. 202 (Tex. 1927)]. The statutory limitation Appellee would imply to render Austin's charter provision inconsistent with state law is, to be charitable, expressed ambiguously. Appellants offer a reasonable construction for the statute that would allow Austin's charter requirement to stand. (Indeed, the office to which Appellants would put the disputed proviso -- that of excluding cases from coverage under the statute -- is the most common office of a proviso. C. Dallas Sands, Statutes and Statutory Construction, section 47.08 (1973)).

The overriding reason for this Court to act, however, is preservation of the integrity of government based on law. For more than a year now, well-intentioned individuals and institutions, over-awed by big banks and Westchester County bond lawyers, have taken shortcuts they should not have taken. Integrity has been drubbed by legal sleight of hand. This Court has the geographical distance and intellectual vision to excise this corrosive homage to expediency.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS, THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

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NO. 14,267

THE CITY OF AUSTIN,

APPELLANT

VS.

ROBERT ASMUSSEN, ET AL.,

APPELLEES

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FROM THE DISTRICT COURT OF TRAVIS COUNTY,
331ST JUDICIAL DISTRICT, NO. 359,009,
HONORABLE PAUL R. DAVIS
JUDGE PRESIDING

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PER CURIAM

The only question presented by this appeal is whether the trial court erred in refusing to set damage bond under the provisions of Sec. 8 of Tex. Rev. Civ. Stat. Ann. art. 717m-1 (Supp. 1984). This statute, hereinafter referred to as "the Act," provides for prior judicial validation of securities to be issued by public agencies.

In March 1984, the City of Austin brought suit, in accordance with Sec. 2 of the Act, seeking a declaratory judgment validating the prospective issuance and delivery of combined utility systems revenue bonds in the amount of $605,000,000, as previously authorized by an ordinance adopted by its city council. As allowed by Sec. 7 of the Act,

appellees Robert Asmussen and thirty-seven other interested persons intervened in opposition to the City's request for validation. The Attorney General of Texas was made a party to the suit, in accordance with Sec. 4 of the Act.

Shortly after the intervention of appellees, the City filed a motion to require a bond of the intervenors, as provided for under Sec. 8 of the Act. After a pretrial hearing, the trial court denied the City's motion, stating in its order:

> In denying the Motion for Bond, the Court does not find that Intervenors have made a showing of probable cause under Article 717m-1, Section 8, but instead, finds that the amount of damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of Intervenors (as opposed to the delay inherent in the validation suit and bond issuance process) cannot be determined with sufficient exactitude to permit the setting of a bond at this time.

Contemporaneously with the hearing on the merits, but prior to the entry of judgment, the City filed a second motion to require bond of the intervenors. After a hearing, this motion was also denied. This appeal, authorized by Sec. 8 of the Act, results.[1]

By one point of error, the City complains of the trial court's refusal to set a bond. In response, the intervenors/appellees argue that in the absence of findings of fact and conclusions of law, which were not requested by the City, the order denying bond should be affirmed upon any theory of law finding support in the evidence. They then suggest that the order may be sustained for any of the following reasons: (1) there is an absence of credible evidence that (a) there will be any prospective damage to the City, (b) of any specific or particular amount, (c) attributable to any delay caused by the continued participation of the appellees in the proceeding; (2) because one of the appellees is indigent, no damage bond under the Act may be imposed as to any of them; and (3) the City was not entitled to make a second request for the bond.

For purposes of this opinion, we will assume that appellees' assertion as to the effect of no findings of fact and conclusions of law is correct. After a careful review of the record, however, we conclude that the court below erred in refusing to set a bond under Sec. 8 of the Act.[2] Accordingly,

we will modify the trial court's order to require a bond of appellees.

We begin our analysis by examining the nature and purpose of art. 717m-1, as explained by the Supreme Court in Buckholts Independent School District v. Glaser, 632 S. W. 2d 146, 149 (Tex. 1982):

> The taxpayers' [, property owners', citizens', or other interested persons'] basic right to prosecute a lawsuit does not insulate them from damages caused to the public agency if their suit proves unfounded. They must post bond only if they fail to show entitlement to a temporary injunction. In these bond cases, the mere existence of the suit acts as a temporary injunction. Bonds cannot be issued because of the existence of the suit. While the action is pending, the interest rates and construction costs may increase.... Since the mere existence of such a suit is likely to cause damages, it was not an unreasonable or arbitrary action for the legislature to provide that a contestant be required to post bond for the damages accruing solely because of the pendency of the suit, to be paid only if the contestant should be unsuccessful in the suit. We agree...that a legislative purpose in enacting the statute was to stop 'the age old practice allowing one disgruntled taxpayer to stop the entire bond issue by simply filing suit.' [emphasis in original]

In the present cause, it is undisputed that appellees did not show themselves entitled to a temporary injunction to block issuance of the bonds. In fact, the order denying the City's second request for bond was signed by the trial court on the same day it entered judgment validating the bonds sought to be issued.

This being the case, we conclude that unless the City completely failed to show any likelihood of damage due to delay caused by appellees' continued participation in the suit, the trial court was required to set a bond under the Act. Although the calculation of prospective damages, especially based upon rising interest rates, is by its very nature somewhat speculative, the Act explicitly authorizes consideration of such a possibility, and it obviously does not require, to support the imposition of a bond, the certainty or the particularity that a suit on the bond itself

would require. We do not find such an absence of proof of the likelihood of damages.

Briefly stated, the City's evidence indicated that of the $605-million issue authorized by ordinance, there was some likelihood that $200 million, would, but for this litigation, be issued within one year's time; that in the opinion of the City's experts the interest rates on municipal bonds of this type were likely to rise at least 1/2% and as much as 1% during the next year; that a year's delay due to any appeal prosecuted by appellees to this Court, the Supreme Court of Texas, and the U.S. Supreme Court would not be unusual; and that, assuming a twenty-year average life of the $200 million in bonds, the loss to the City in the event of a 1/2% increase in interest rates would be approximately $28 million over the life of the bonds. Without objection, the City produced evidence that a challenge directed toward an earlier bond issue of the City had consumed approximately a year, despite an accelerated appellate schedule. See Bischoff v. City of Austin, 656 S.W. 2d 209, 662 S.W. 2d 156 (Tex. App. 1983, writ ref'd n.r.e.), appeal dism'd and cert. denied, _____ U.S. _____, 104 S.Ct. 1699 (1984).

Viewed in its most favorable light, appellees' controverting evidence will not support the trial court's order. It is not enough to show, as appellees argue to this Court, that there are many opinions regarding the rise and fall of interest rates, or that it is possible interest rates may fall as well as rise in the future. Further, appellees' assertion that the proceeds from the present bond issue in dispute will not be needed by the City during the next year, due to the removal of legal impediments to the issue challenged in Bischoff, misses the mark. The bonds at issue in Bischoff are specifically identified by the ordinance as funds for "improving and extending the [City's] Electric Light and Power System...." It is rather obvious that while the bonds at issue in Bischoff may supply the funds for the City's participation in that project for a year, the bond issue impeded by this suit includes funds for the general maintenance and extension of the City's electric system in a period of rapid growth and improvement.

We also reject appellees' contention that a damage bond may not be required because one of their number is indigent. The principle that indigents, as a matter of due process and equal protection, may not be denied access to the courts for the assertion of basic rights, Boddie v. Connecticut, 401 U.S. 371 (1971), is not without limitation. In reviewing the propriety of

bond requirements, as applied to indigents, the test is whether there is a rational justification for the imposition of the bond. See U.S. v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973). A statute imposing a bond requirement will be upheld if it rationally furthers a legitimate state interest.

In this case, a damage bond is required under Sec. 8 of the Act:

> to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition.

As such, this provision furthers the legitimate state interest of providing for the funding of public improvements and projects without burdensome financial penalty to the public due to delay if the opponent's challenge should prove meritless. As required by Kras and Ortwein, the indigent litigant possesses alternate methods of obtaining available relief, so that his right to challenge the issuance of securities is not strictly conditional upon the posting of the bond. First, the bond is required only if the intervenor is unable to convince the trial court of the invalidity of the security to be issued. Second, if a bond is imposed, an appeal from that determination is available.

Moreover, the bond requirement is a reasonable procedural provision to protect against significant financial loss to the City. Because the bond requirement is uniformly and nondiscriminatorially applied to all intervenors under the Act, indigent and non-indigent alike, there is no violation of the indigent's rights to equal protection just because the continuation of the proceeding is conditioned upon the posting of a bond. See Lindsey v. Normet, 405 U.S. 56 (1972); Ross v. Brown Title Corp., 356 F.Supp. 595 (E.D.La.), aff'd, 412 U.S. 934 (1973). In this context, the concept of equal protection requires that indigents have "equal" access to the courts; it does not require that they have rights superior to those of non-indigents.

We also find without merit appellees' contention that the City was not authorized to seek the imposition of a damage bond a second time during the pendency of the suit below. They cite no authority for this proposition, and the contention is not consistent with motion practice relating to relief ancillary to the

merits of a cause. An interlocutory order is not res judicata of the issue it addresses. During the pendency of a cause, a trial court retains the power to modify or set aside its interlocutory orders, and to enter new orders, whether requested to do so by a party or not. Kone v. Security Finance Co., 313 S.W. 2d 281, 286 (Tex. 1958); Texas Crushed Stone Co. v. Weeks, 390 S.W. 2d 846, 849 (Tex. Civ. App. 1965, writ ref'd n.r.e.).

Accordingly, we here modify the order of the trial court to require a damage bond of all of the appellees. In setting the amount of the bond, we have taken into account the lowest potential for loss supported by the record, referable to the likely period of delay occasioned by the continuation of this proceeding on the merits, reduced to present value. We are of the opinion that a bond in the amount of $2,000,000 will be sufficient to cover all damages and costs attributable to such delay. In accordance with Sec. 8 of the Act, unless the bond, with sufficient surety, is filed in this Court within ten days from the date of this opinion and accompanying order, the cause on the merits now pending in this Court will be dismissed. If the bond is filed, any appellee not appearing and signing as a principal thereon will be dismissed from the proceedings.

Because this opinion presents no question or application of any rule of law of interest or importance to the jurisprudence of this State, it is ordered not published. Tex. R. Civ. P. Ann. 452 (Supp. 1984).

[Before Justices Shannon, Powers, and Brady]

Modified to Require Bond

Filed: October 31, 1984

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[1]The intervenors' appeal from the trial court's judgment validating the bonds is pending before this Court in a separate cause.

[2]Article 717m-1, Section 8 provides, in relevant part:

> At any time prior to entry of final judgment in the proceedings, the public agency may ask the court for an order that any opposing part or intervenor, except the attorney general, be dismissed unless the opposing party or intervenor shall post a bond with sufficient surety, approved by the court, payable to the public agency for the payment of all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the

opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition.

* * * *

Unless at the hearing on the motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities, the court shall grant the motion of the public agency and in its order the court shall fix the amount of the bond to be posted by the opposing party or intervenor in an amount found by the court to be sufficient to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court in its discretion may receive evidence at the hearing...with respect to the amount of the damages and costs, which shall include but not be limited to anticipated increases in interest rates and in construction and financing costs. If more than one opposing party or intervenor is a participant in the proceedings, the court in its discretion may allocate the amount of the bond among the opposing parties or intervenors according to the extent or degree of their participation in the proceedings....

APPENDIX B

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

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ORDER RENDERED OCTOBER 31, 1984

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14,267--THE CITY OF AUSTIN V. ROBERT ASMUSSEN, ET AL.; APPEAL FROM 331ST DISTRICT COURT OF TRAVIS COUNTY Before Justices Shannon, Powers and Brady MODIFIED TO REQUIRE BOND -- Per Curiam Opinion

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of the Court that damages are likely to accrue to the City of Austin by reason of the delay occasioned by the continued participation of the appellees herein, as intervenors in the proceedings on the merits, in the event that the City of Austin finally prevails and obtains substantially the judgment prayed for; that the City's motion for bond should have therefore been granted by the court below; and that there was therefore error in the order of the court below, refusing to require a damage bond of the appellees herein: IT IS THEREFORE considered, adjudged and ordered that the order of the court below be and is hereby modified to provide that the intervening parties, appellees Robert Asmussen, Stephen Beers, Phillip S. Blackerby, Richard Burns, Smoot Carl-Mitchell, Charlotte Carl-Mitchell, Jeffrey James Conn, Bert Cromack, Christine Crosby, James R. Crosby, William Thomas Crouse, III, Sophie Dunn, Mary Eakin, Pat Eakin, Fred Ebner, Delora Frederickson, Ruby Goodwin, Charlie Haney, Dan Harrison, Rebecca Howard, Craig Jordan, Allison LaTouf, Jere S. Locke, Betty Matau, Michael T. McConnell, Max Nofziger, James A. Pinedo, Ray Reece, Joe Riddell, Robert L. Russell, Kenneth Shepardson, Regina Shults, William A. Simmons, Lanny A. Sinkin, Daryl Slusher, Heidi Gillette Sorenson, Matthew Sorenson, Craig Von Steiger, be and are hereby required to post a bond, payable to

the City of Austin, with sufficient surety to be approved by the Court, in the amount of Two Million Dollars ($2,000,000), providing for the payment of all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the said appellees, as intervenors in the proceedings on the merits, in the event that the City of Austin finally prevails and obtains substantially the judgment prayed for in its petition in the court below. IT IS FURTHER ordered that if such bond is not posted within ten (10) days after entry of this order, the cause on the merits now pending in this Court as No. 14,302, styled Robert Asmussen, et al. v. The City of Austin, will be dismissed with prejudice without further hearing, and that such dismissal shall be a final judgment of this Court; provided, also, that if the bond be timely posted, any appellee not appearing and signing as a principal thereon shall be dismissed from the proceedings. IT IS FURTHER ordered that the appellees named herein, excepting Craig Von Steiger, who has filed an affidavit of indigency herein, pay all costs of this appeal; and that this order be certified below for observance.

## APPENDIX C

## IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

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## JUDGMENT RENDERED NOVEMBER 14, 1984

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14,302--ROBERT ASMUSSEN, ET AL. V. CITY OF AUSTIN, APPEAL FROM 331ST DISTRICT COURT OF TRAVIS COUNTY Before Justices Shannon, Powers and Brady DISMISSED FOR WANT OF JURISDICTION

THIS CAUSE having this day come on to be considered, and it appearing to the Court that the appellants herein have failed to post a bond as required by Tex. Rev. Civ. Stat. Ann. art. 717m-1, Sec. 8 (Supp. 1984) and this Court's order of October 31, 1984, in its cause no. 14,267, styled The City of Austin v. Robert Asmussen, et al.; and it further appearing to the Court, under the provisions of art. 717m-1, Sec. 8, that the appellants therefore cannot continue to prosecute this appeal and that this Court is without further jurisdiction of this appeal: IT IS THEREFORE considered, adjudged and ordered that the appellants, Robert Asmussen, Stephen Beers, Phillip S. Blackerby, Richard Burns, Smoot Carl-Mitchell, Charlotte Carl-Mitchell, Jeffrey James Conn, Bert Cromack, Christine Crosby, James R. Crosby, William Thomas Crouse, III, Sophie Dunn, Mary Eakin, Pat Eakin, Fred Ebner, Delora Frederickson, Ruby Goodwin, Charlie Haney, Dan Harrison, Rebecca Howard, Craig Jordan, Allison LaTouf, Jere S. Locke, Betty Matau, Michael T. McConnell, Max Nofziger, James A. Pinedo, Ray Reece, Joe Riddell, Robert L. Russell, Kenneth Shepardson, Regina Shults, William A. Simmons, Lanny A. Sinkin, Daryl Slusher, Heidi Gillette Sorenson, Matthew Sorenson, Craig Von Steiger, be and are hereby dismissed from this proceeding with prejudice, and that the appeal be and is hereby dismissed for want of jurisdiction. IT IS FURTHER ordered that Smoot Carl-Mitchell, the only appellant to perfect appeal by the filing of a cost bond herein, as principal, and

Hartford Casualty Insurance Company, as surety on such bond, pay all costs of this appeal, and that this decision be certified below for observance.

APPENDIX D

NO. 359,009

| | |
|---|---|
| EX PARTE | )( IN THE DISTRICT COURT |
| CITY OF AUSTIN | )( TRAVIS COUNTY, TEXAS |
| | )( 331ST JUDICIAL DISTRICT |

ORDER

On this day, came on for consideration the motion of the City of Austin that Intervenors be required to post bond herein, and the Court, having considered such motion, it is ORDERED that such motion be, and is hereby, DENIED.

SIGNED this the 5th day of July, 1984.

/s/
PAUL R. DAVIS, JR.
JUDGE PRESIDING

APPENDIX E

NO. 359,009

| | | |
|---|---|---|
| EX PARTE | )( | IN THE DISTRICT COURT |
| CITY OF AUSTIN | )( | TRAVIS COUNTY, TEXAS |
| | )( | 331ST JUDICIAL DISTRICT |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, in response to a request from Respondents, makes its Findings of Fact and Conclusions of Law in the above styled and numbered cause as follows:

## FINDINGS OF FACT

1. Petitioner is a municipal corporation and a city duly incorporated under the Constitution and the laws of the State of Texas, and operating under a home-rule charter adopted pursuant to Article XI, Section 5, of the Constitution of Texas.

2. Intervenors are taxpayers, property owners, or residents of Petitioner; non-residents owning property therein; or others having an interest in property or funds to be affected by the proceedings of this cause or the issuance of the securities to be validated by this cause.

3. Article VII, Section 11, of Petitioner's [the "City's"] home-rule charter provides that "all revenue bonds issued by the City shall first be authorized by a majority of the qualified electors voting at an election held for such purpose.."

4. The City Council of the Petitioner, being its governing body, on the 19th day of April, 1984, duly approved a Resolution Authorizing and Directing the Giving of Notice of Said City Council's Intention to Issue $605,000,000 City of Austin, Texas, Combined Utility Systems Revenue Bonds (the "Resolution").

5. Pursuant to the Resolution, a Notice (the "Notice") was published in the "Austin American-Statesman," a newspaper of general circulation in Travis and Williamson Counties, and published in the City of Austin, Travis County, Texas, once a week for two (2) consecutive weeks prior to the time set for passage of the ordinance authorizing the issuance of the securities, with the date of first publication being at least fourteen (14) days prior to the date set, specifically, on April 23, 1984, and again on April 30, 1984, as follows:

> NOTICE IS HEREBY GIVEN, in accordance with Article 2368a, Vernon's Annotated Texas Statutes, that the City Council of the City of Austin, Texas, intends to finally pass at a regular meeting to be held at the City Council Chambers, 307 West Second Street, in Austin, Texas, on May 10, 1984, at 1:00 o'clock p.m., an Ordinance authorizing the issuance of negotiable bonds to be designated as "City of Austin, Texas Combined Utility Systems Revenue Bonds" in the maximum principal amount of $605,000,000, and to be payable from, and secured by a lien on the pledge of the Pledged Revenues as will be defined in the aforesaid Ordinance, and which include the Net Revenues of said City's combined Waterworks and Sewer System and Electric Light and Power System. Said bonds will bear interest from their date at maximum rates not to exceed a net effective interest rate of 15%, will be scheduled to mature within a maximum of not to exceed 40 years from their date, and will be subject to redemption prior to maturity, and will have such other characteristics as will be provided in the aforesaid Ordinance. Said Bonds will be authorized, issued, sold and delivered pursuant to Article 1111, et seq., Vernon's Annotated Texas Statutes, and other applicable laws, for the purpose of providing money for improvements and extensions to said City's Electric Light and Power System.
>
> CITY OF AUSTIN, TEXAS
> Ron Mullen
> Mayor

6. The Petitioner, by and through its City Council, did on May 10, 1984 duly enact an Ordinance (the "Bond Ordinance") entitled:

> "AN ORDINANCE by the City Council of the City of Austin, Texas, authorizing the issuance of $605,000,000 'CITY OF AUSTIN, TEXAS, COMBINED UTILITY SYSTEMS REVENUE BONDS'; prescribing the form of said bonds; pledging the net revenues of the City's Electric Light and Power System and Waterworks and Sewer System to the payment of principal of and interest on said bonds; enacting other provisions incident and related to the issuance, sale and delivery of such bonds; and declaring an emergency."

7. Petitioner has not held an election for the purpose of authorizing issuance of the revenue bonds that are the subject of the Bond Ordinance, nor is the ordinance contingent upon authorization of that bond issuance by a majority of the City's qualified electors.

Any finding of fact hereinabove made which also constitutes a conclusion of law is adopted as a conclusion of law.

## CONCLUSIONS OF LAW

1. The pivotal legal issue in this cause is whether the voter authorization provision of Article VII, Section 11, of Petitioner's home-rule city charter is inconsistent with Art. 1112, Tex. Rev. Civ. Stat.

2. If and only if Article VII, Section 11, of Petitioner's home-rule city charter is inconsistent with Art. 1112, Tex. Rev. Civ. Stat., then:

a. The $605,000,000 City of Austin, Texas, Combined Utility Systems Revenue Bonds, the "Securities," are authorized to be issued, sold, and delivered by and pursuant to TEX. REV. CIV. STAT. ANN. arts, 717 et seq, and arts. 1111 et seq. (Supp. 1982-1983).

b. The Petitioner is authorized by law to issue and deliver the Securities.

c. The Bond Ordinance is legal and valid, and when the Securities are authorized, issued, sold, and delivered, the Securities will be legal, valid, and binding obligations of the Petitioner enforceable in all respects in accordance with their terms and provisions.

d. The following are legal and valid:

All proceedings, including the Resolution and the Notice and all actions and expenditures of funds, taken or made and/or proposed to be taken or made in connection with or affecting the Securities and the proceeds from the sale thereof;

The proposed levy and collection of rates, fees, charges and tolls to be made by the Petitioner for the services of the Petitioner's Systems, and the instruments relating thereto; and

The pledge of revenues of the Petitioner's Systems in connection with and to secure and pay the principal of, premium, if any, and interest on the Securities, and the instruments relating thereto.

e. All proceedings taken in connection with the authorization and issuance of the Securities are in compliance with applicable law and validated and confirmed, and when issued and delivered to the purchasers thereof, the Securities will constitute lawful and valid obligations of Petitioner enforceable according to their terms.

3. Article VII, Section 11, of Petitioner's home-rule city charter is inconsistent with Art. 1112, Tex. Rev. Civ. Stat.

Any conclusion of law hereinabove made which also constitutes a finding of fact is adopted as a finding of fact.

SIGNED this 3rd day of August, 1984.

/s/
JUDGE PRESIDING

APPENDIX F

No. 359,009

| | | |
|---|---|---|
| EX PARTE | )( | IN THE DISTRICT COURT |
| | )( | |
| CITY OF AUSTIN | )( | TRAVIS COUNTY, TEXAS |
| | )( | |
| | )( | 331ST JUDICIAL DISTRICT |

JUDGMENT

On this the 5th day of July, 1984, in the above entitled, styled, and numbered cause, came on to be considered the above captioned cause, pursuant to Notice and Order duly given, and came the City of Austin, Texas (hereinafter sometimes referred to as the "City"), Petitioner, and appeared by and through its attorneys of record, and the Honorable Jim Mattox, as Attorney General of the State of Texas, appeared through an Assistant Attorney General, and at the conclusion of said hearing the Court here and now enters the final judgment, and makes all necessary findings of facts and conclusions of law in support thereof, some of which are as follows:

The Court finds that Notice of these proceedings has been given, issued, published, and served as required by law; that a certified copy of the City's Petition, the Order giving Notice, the City's Amended Petition, and a transcript relating to the Securities which are hereinafter defined have been furnished the Attorney General of the State of Texas; and that the Attorney General of the State of Texas has appeared, at the time and in the manner required by law to give this Court jurisdiction hereof and to require the appearance of all parties hereto and interested herein or affected hereby.

The parties, Intervenors and Attorney General of Texas appeared through counsel of record and announced ready for trial.

The City having filed its Amended Petition, the Attorney General having filed his Original Appearance, the Court considered this proceeding brought under the provisions of Tex. Rev. Civ. Stat. Ann. Article 717m-1 (Supp. 1982-1983), and upon due hearing and trial after the reading of the respective pleadings and receiving the evidence and the argument of

counsel, is of the opinion and finds that the allegations in the City's Amended Petition are true and correct, and that the law and the facts are with the City and that the City is entitled to all the orders and judgment prayed for by the City in its Amended Petition.

The Court having considered the pleadings, the evidence, and the arguments of counsel, hereby finds and enters Judgment as follows:

(1) that the City is authorized to issue and deliver the following defined securities (the "Securities"): "City of Austin, Texas, Combined Utility Systems Revenue Bonds," to be issued from time to time in one or more series or issues pursuant to the Bond Ordinance described in the City's Amended Petition in the maximum aggregate principal amount of $605,000,000.00, bearing interest at rates not in excess of rates permitted by law at the time of issue, for the purpose of improving and extending the City's Electric Light and Power System, with the Securities to be issued and delivered with the characteristics set forth in the Bond Ordinance;

(2) that when the Securities are authorized, issued, sold, and delivered as proposed in the City's Petition, the Securities will be legal, valid, and binding obligations of the City enforceable in all respects in accordance with their terms and provision; and

(3) that the following are legal and valid: (i) all proceedings, including all actions and expenditures of funds taken or made and/or proposed to be taken or made in connection with or affecting the Securities and the proceeds from the sale thereof, and including (x) the Resolution, the Notice, and the Bond Ordinance, as described in the City's Amended Petition, (y) the proposed levy and collection of rates, fees, and charges to be made by the City (as provided by the Bond Ordinance) for the services of the City's Electric Light and Power System and the City's Waterworks and Sewer System (together, the "Systems"), and the instruments relating thereto, and (z) the proposed pledge of revenues of the City's Systems in connection with and to secure and pay the principal of and interest on the Securities, and the instruments relating thereto.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED BY THE COURT;

(1) That the City is authorized to issue and deliver the following defined securities (the "Securities"): "City of Austin, Texas, Combined Utility Systems Revenue Bonds", to be issued

from time to time in one or more series or issues pursuant to the Bond Ordinance described in the City's Amended Petition, in the maximum aggregate principal amount of $605,000,000.00, bearing interest at rates not in excess of rates permitted by law at the time of issue, for the purpose of providing funds for the purpose of improving and extending the City's Combined Utility Systems, to wit: improving and extending the City's Electric Light and Power System, with the Securities to be issued and delivered with the characteristics set forth in the Bond Ordinance;

(2) That the Bond Ordinance was duly and properly adopted and is legal and valid, and that when the Securities are authorized, issued, sold, and delivered as proposed in the City's Amended Petition, the Securities will be legal, valid, and binding obligations of the City enforceable in all respects in accordance with their terms and provisions; and

(3) That the following are legal and valid: (i) all proceedings, including the Resolution and the Notice described in the City's Amended Petition and all actions and expenditures of funds, taken or made and/or proposed to be taken or made in connection with or affecting the Securities and the proceeds from the sale thereof, (ii) the proposed levy and collection of rates, fees, and charges to be made by the City for the services of the City's Systems, and the instruments relating thereto, and (iii) the proposed pledge of revenues of the City's Systems in connection with and to secure and pay the principal of and interest on the Securities, and the instruments relating thereto.

(4) That the Securities adjudged valid as herein provided shall when issued and delivered have stamped or written thereon the following statement, to be signed by the facsimile signature of the Clerk of the City, to wit:

> "This obligation was validated and confirmed by a judgment entered on _____, in Cause No. 359,009 in the 331st Judicial District Court of Travis County, Texas, styled EX PARTE CITY OF AUSTIN, which perpetually enjoins the institution of any suit, action, or proceeding involving the validity of this obligation, or the provisions made for the payment of the principal thereof and interest thereon."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that this judgment, order, and decree shall be forever binding and conclusive against the City, the Attorney General, the Comptroller of Public Accounts, and

all parties to the cause, whether mentioned in and served with said Notice of the proceedings, or included in the description "taxpayers, property owners, and residents of the City, and all non-residents owning property therein, and all others having or claiming any right, title, or interest in any property or funds to be affected by the proceedings and/or the issuance of the Securities or interested or affected in any way thereby, or by said proceedings, including all actions and expenditures of funds, taken and/or made or proposed to be taken or made in connection with or affecting the Securities", and shall constitute a permanent injunction against the institution by any person or entity of any action or proceedings contesting the validity of the proceedings and/or the Securities described in the City's Petition or herein, or the validity or provisions made for the payment of the Securities, or of the interest thereon, or any matters adjudicated by this judgment, or which could have been raised in the proceedings.

SIGNED this the 5th day of July, 1984.

/s/
JUDGE PRESIDING

APPENDIX G

CLERK'S OFFICE--COURT OF APPEALS
Third Supreme Judicial District
P.O. Box 12547--Capitol Station
Austin, Texas 78711

November 28, 1984

RE: No. 14,267--The City of Austin v. Robert Asmussen, et al.

Dear Sir:

You are hereby notified that appellees' motion for rehearing was this day submitted and overruled.

Very truly yours,

Mrs. Margie Love, Clerk

APPENDIX H

CLERK'S OFFICE--COURT OF APPEALS
Third Supreme Judicial District
P.O. Box 12547--Capitol Station
Austin, Texas 78711

December 12, 1984

RE: No. 14,302--Robert Asmussen, et al. v. City of Austin

Dear Sir:

You are hereby notified that appellants' motion for rehearing was this day submitted and overruled.

Very truly yours,

Mrs. Margie Love, Clerk

APPENDIX I

IN THE SUPREME COURT OF TEXAS

+ + + + +

No. C-3752 February 6, 1985

ROBERT ASMUSSEN ET AL.

VS. From Travis County, Third District

CITY OF AUSTIN

Application of Petitioners for writ of error to the Court of Appeals for the Third Supreme Judicial District, together with respondent's motion to dismiss for want of jurisdiction having been duly considered, it is ordered that said motion to dismiss be, and hereby is, overruled; and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused. (Motion to expedite.)

It is further ordered that applicants, Robert Asmussen et al., pay all costs incurred on this application.

* * * * *

IN THE SUPREME COURT OF TEXAS

+ + + + +

No. C-3753 February 6, 1985

ROBERT ASMUSSEN ET AL.

VS. From Travis County, Third District

Application of petitioners for writ of error to the Court of Appeals for the Third Supreme Judicial District, together with respondent's motion to dismiss for want of jurisdiction having been duly considered, it is ordered that said motion to dismiss

be, and hereby is, overruled; and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused. (Motion to expedite granted.)

It is further ordered that applicants, Robert Asmussen et al., pay all costs incurred on this application.

APPENDIX J

IN THE SUPREME COURT OF TEXAS

+ + + + +

No. C-3752 March 27, 1985

ROBERT ASMUSSEN ET AL.

VS. From Travis County, Third District

CITY OF AUSTIN

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

* * * * *

IN THE SUPREME COURT OF TEXAS

+ + + + +

No. C-3753 March 27, 1985

ROBERT ASMUSSEN ET AL.

VS. From Travis County, Third District

CITY OF AUSTIN

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that motion be, and hereby is, overruled.

APPENDIX K

COURT OF APPEALS FOR THE
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS

| | | |
|---|---|---|
| ROBERT ASMUSSEN, ET AL. | )( | |
| Appellants | )( | |
| v. | )( | |
| CITY OF AUSTIN, | )( | Nos. 14,267 and |
| Appellee | )( | 14,302 |
| v. | )( | |
| JIM MATTOX, ATTORNEY | )( | |
| GENERAL OF TEXAS | )( | |

SECOND NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Robert Asmussen, Phillip Blackerby, Richard Burns, Smoot Carl-Mitchell, Carlotte Carl-Mitchell, Bert Cromack, Christine Crosby, James Crosby, William Thomas Crouse, Sophie Dunn, Mary Eakin, Pat Eakin, Fred Ebner, Charlie Haney, Dan Harrison, Betty Matau, Max Nofziger, James Pinedo, Ray Reece, Joe Riddell, Robert Russell, Regina Shults, William Simmons, Lanny Sinkin, Daryl Slusher, and Craig von Steiger, parties Appellee in Cause No. 14,267 and parties Appellant in Cause No. 14,302, hereby appeal to the Supreme Court of the United States from the final judgments of the Court of Appeals for the Third Supreme Judicial District of Texas in the above-numbered causes. In Cause No. 14,267, entered October 31, 1984, the Court of Appeals reversed the trial court's interlocutory order that parties appellee were not required to post a prospective damage bond. In Cause No. 14,302, entered November 14, 1984, the Court of Appeals dismissed, for failure to post a prospective damage bond, parties appellants' appeal of the trial court's final order on the merits.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

Respectfully submitted,

HENRY, LOWERRE & MASON
2103 Rio Grande
Austin, Texas 78705
512/479-8125

BY: /s/
David Frederick
State Bar No. 07412300

Certificate of Service

I hereby certify that true and correct copies of the Second Notice of Appeal to the Supreme Court of the United States were forwarded by U.S. Mail, postage prepaid on this the 12th day of June, 1985, to the following:

Marjorie Love, Clerk
Court of Appeals
Supreme Court Building
Austin, Texas 78711

Susan Voss
Assistant Attorney General
Attorney General's Office
P. O. Box 12548
Austin, Texas 78711

Mary Joe Carrol
Clark, Thomas & Winters
P. O. Box 11488
Austin, Texas 78767

Paul Isham
City Attorney
City of Austin
P. O. Box 1088
Austin, Texas 78767

/s/
David Frederick

## APPENDIX L

(art. 717m-1, secs. 8 and 9,
Tex. Rev. Civ. Stat.)

### Bond

Sec. 8. At any time prior to entry of final judgment in the proceedings, the public agency may ask the court for an order that any opposing party or intervenor, except the attorney general, be dismissed unless the opposing party or intervenor shall post a bond with sufficient surety, approved by the court, payable to the public agency for the payment of all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court shall then issue an order directed to the opposing party or intervenor, which order, together with a copy of the motion, shall be served on the opposing party or intervenor, or on his attorney of record, personally or by registered mail, requiring the opposing party or intervenor to appear at the time and place, not sooner than 5 nor later than 10 days after entry of the order, as the court may direct, and show cause why the motion should not be granted. Motions with respect to more than one opposing party or intervenor may be heard together if so directed by the court. Unless at the hearing on the motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities, the court shall grant the motion of the public agency and in its order the court shall fix the amount of the bond to be posted by the opposing party or intervenor in an amount found by the court to be sufficient to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for its petition. The court in its discretion may receive evidence at the hearing or any adjournment with respect to the amount of the damages and costs, which shall include but not be limited to anticipated increases in interest rates and in construction and

financing costs. If more than one opposing party or intervenor is a participant in the proceedings, the court in its discretion may allocate the amount of the bond among the opposing parties or intervenors according to the extent or degree of their participation in the proceedings, but may fix the amount of the bond to be posted by a particular opposing party or intervenor only if a motion as described in this section was made and granted as to the opposing party or intervenor. In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court, unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised by an opposing party or intervenor as to whom no motion was made hereunder. An order of the court fixing the amount of the bond to be posted by an opposing party or intervenor or denying the motion of a public agency or dismissing a party for failure to file a bond may be appealed as provided in Section 9 of this Act. The court to which any appeal is taken may modify the order of the lower court and may enter the modified order as the final order. In the event no appeal is taken or if the appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised in the proceedings by an opposing party or intervenor as to whom no motion was made hereunder. It is further provided that, on motion of the public agency, the court shall proceed without delay to hearing and trial on the merits of the public agency's petition, regardless of the pendency of an appeal from any order entered pursuant to this section.

Appeal

Sec. 9. Any party to the cause, whether the public agency, a defendant, intervenor, or otherwise, dissatisfied with any order entered paramount to Section 8 of this Act, or with the

judgment in the declaratory judgment action, may appeal therefrom to the appropriate court of civil appeals after the entry of the order or judgment, or the order or judgment shall become final. The appeal shall take priority over all other cases, causes, or matters pending in the court of civil appeals, except habeas corpus, and it shall be mandatory that the court of civil appeals assure the priority and act thereon and render its final order or judgment therein with the least possible delay. The Supreme Court shall have authority to review, by writ of error or other authorized procedure, all questions of law arising out of the orders and judgments of the courts of civil appeals in the cases, in the manner, time, and form applicable in other civil causes where a decision of the court of civil appeals is not final, but any such review shall take priority over all other cases, causes, or matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment therein with the least possible delay. Also, Rule 499a, Texas Rules of Civil Procedure, shall apply to proceedings in the district court, but any direct appeal thereunder shall take priority over all other cases, causes, and matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment with the least possible delay.

## APPENDIX M

### SIGNATURE AND NO-LITIGATION CERTIFICATE

THE STATE OF TEXAS )(
)(
COUNTY OF TRAVIS )(

WE, the undersigned, officials of the City of Austin, Texas (the "Issuer"), hereby certify as follows:

(1) That this certificate is executed and delivered with reference to the following described bonds: "CITY OF AUSTIN, TEXAS, COMBINED UTILITY SYSTEMS REVENUE BONDS, SERIES 1985", dated March 15, 1985 (the "Bond Date"), in the aggregate principal amount of $225,000,000 (the "Bonds").

(2) The Bonds have been duly and officially executed by the undersigned with their manual or facsimile signature in the same manner appearing hereon, and the undersigned hereby adopt and ratify their respective signatures in the manner appearing on each of the Bonds whether in manual or facsimile form, as the case may be, as their true, genuine and official signatures.

(3) That on the Bond Date and on the date hereof, we were and are the duly chosen, qualified and acting officers indicated therein and authorized to execute the same.

(4) That the legally adopted proper and official corporate seal of the Issuer is impressed, imprinted or lithographed on all of the Bonds and impressed on this certificate.

(5) That no litigation of any nature is now pending before any federal or state court, or administrative body, or to our knowledge threatened, seeking to restrain or enjoin the issuance, sale or delivery of the Bonds or the authority or actions of the governing body of the Issuer authorizing the issuance or sale of the Bonds, or, except as noted in the Official Statement, dated March 1, 1985, relating to the sale of the Bonds, questioning or affecting the operations of the City's Waterworks and Sanitary Sewer System or the City's Electric Light and Power Systems (the "Systems"), the revenues derived from the operations and ownership of the Systems or the rates and charges for products and services provided thereby, or that would otherwise adversely affect in a material manner the

financial condition of the Issuer, or the Systems, to pay the principal of and interest on the Bonds; and that neither the corporate existence or boundaries of the Issuer nor the right to hold office of any member of the governing body of the Issuer or any other elected or appointed officer of the Issuer is being contested or otherwise questioned.

(6) That no petition or other request has been filed with or presented to any official of the Issuer requesting that any proceedings authorizing the issuance of the Bonds adopted by the governing body of the Issuer be submitted to a referendum or other election; no authority or proceeding for the issuance, sale or delivery of the Bonds, passed and adopted by the governing body of the Issuer, has been amended, repealed, revoked, rescinded or otherwise modified since the date of passage thereof, and all such proceedings and authority relating to the issuance and sale of the Bonds remain in full force and effect as of the date of this Certificate.

EXECUTED AND DELIVERED this 8th day of April, 1985.

(Issuer's Seal)

| SIGNATURE | OFFICIAL TITLE |
|---|---|
| Ron Mullen | Mayor, City of Austin, Texas |
| James E. Aldridge | City Clerk, City of Austin, Texas |

The signatures of the officers subscribed above are hereby certified to be true and genuine.

TEXAS COMMERCE BANK-AUSTIN, N.A.

By B. J. Quesenberry
Authorized Officer

(Bank Seal)

**********

## "OFFICIAL STATEMENT" EXCERPT

Bond Validation. The City authorized the issuance of $605 million of revenue bonds for Austin's anticipated completion costs in the South Texas Nuclear Project ("STP"). This authorization was voted by the City Council pursuant to state law even though Austin's Charter requires a vote prior to the authorization and issuance of revenue bonds. The City proceeded with a bond validation suit in state district court to validate the $605 million issuance, and thirty-two citizens intervened. The district court issued a judgment in the validation proceeding upholding the authority of the City to issue revenue bonds without a vote of the citizens, but ruled that a surety bond need not be posted by the intervenors in order to appeal the decision. Two of the intervenors appealed the District Judge's opinion validating the Bonds. The Austin Court of Appeals dismissed the appeal and the intervenors appealed to the Supreme Court of Texas. The Supreme Court upheld the Court of Appeals on February 6, 1985. In addition, in a separate action, the City filed an expedited appeal to the Judge's holding that a surety bond need not be posted by the intervenors. The Court of Appeals in Austin held that the District Judge erred in not setting a bond and held that a $2 million bond should be posted. The intervenors appealed to the Supreme Court of Texas but the Court has upheld the Court of Appeals. The intervenors have since filed a motion for re-hearing before the Supreme Court of Texas. The City expects the intervenors to appeal to the United States Supreme Court and cannot predict when the validation process will be completed. The City intends to issue approximately $76.8 million of such $605 million as a portion of this issue of Bonds, whether or not the validation process is completed.

OFFICIAL STATEMENT DATED MARCH 1, 1985: $225,000,000 COMBINED UTILITY SYSTEMS REVENUE BONDS, SERIES 1985; City of Austin, Texas - p. 44

85-205

Supreme Court, U.S.
FILED
SEP 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. A-932

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT ASMUSSEN, ET AL., *Appellants*

v.

CITY OF AUSTIN, TEXAS, *Appellee-Respondent*

v.

HON. JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *Appellee*

**On Appeal From The Court Of Appeals For The Third Supreme Judicial District Of Texas**

## CITY OF AUSTIN'S MOTION TO DISMISS OR AFFIRM

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BEST AVAILABLE COPY

15 pp

## LIST OF PARTIES

CITY OF AUSTIN, TEXAS, Appellee here, Appellant in the interlocutory cause below, and Appellee in the cause on its merits below.

HON. JIM MATTOX, ATTORNEY GENERAL OF TEXAS, Appellee here, Appellee in the interlocutory cause below, and Appellee in the cause on its merits below.

Appellees in the interlocutory cause below, not parties here:

Stephen Beers
Delora Frederickson
Rebecca Howard
Allison LaTouf
Michael McConnell
Heidi Gillette Sorenson
Jeffrey James Conn
Ruby Goodwin
Craig Jordan
Jere S. Locke
Kenneth Shepardson
Matthew Sorenson

Appellants here, Appellees in the interlocutory cause below, and Appellants in the cause on its merits below:

Robert Asmussen
Richard Burns
Charolette Carl-Mitchell
Christine Crosby
William Thomas Crouse
Mary Eakin
Fred Ebner
Dan Harrison
Max Nofziger
Ray Reece
Robert L. Russell
William A. Simmons
Daryl Slusher
Phillip S. Blackerby
Smoot Carl-Mitchell
Bert Cromack
James R. Crosby
Sophie Dunn
Pat Eakin
Charlie Haney
Betty Matau
James Pinedo
Joe Riddell
Regina Shults
Lanny Sinkin
Craig von Steiger

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NO. A-932

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT ASMUSSEN, ET AL., *Appellants*

v.

CITY OF AUSTIN, TEXAS, *Appellee-Respondent*

v.

HON. JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *Appellee*

## CITY OF AUSTIN'S MOTION TO DISMISS OR AFFIRM

Appellants have filed a hybrid document purporting to present two questions on appeal. Although they have titled it "Jurisdictional Statement," Appellants concede that the second of the stated questions is subject only to review by certiorari and assert reliance on 28 U.S.C. § 2103 as well as on 28 U.S.C. §§ 1257(2) and 1257(3). Regardless of whether the instrument is treated as presenting an appeal or an application for writ of certiorari, the case to which it relates does not merit the exercise of jurisdiction by this Court.

## GROUNDS FOR DISMISSAL OR AFFIRMANCE

**(1) The case has become moot.**

The City of Austin instituted this litigation as a bond validation suit under the provisions of art. 717m-1 of the Revised Civil Statutes of the State of Texas. Appellants were intervenors who unsuccessfully sought to prevent the issuance of the bonds. After termination of the state proceedings, the bonds were sold; Appellants so concede (Statement 18). Appellants could have filed —but did not file—a motion for stay of mandate. The bonds issued by the City of Austin have been examined by the Attorney General, approved by him, registered with the Comptroller of Public Accounts and are now incontestable. Articles 709-715, Tex. Rev. Civ. Stat. Mootness is clearly a ground for dismissal.

In *Doremus v. Board of Education,* 342 U.S. 429, 72 S. Ct. 394, 96 L.Ed. 475 (1952), it was pointed out that (342 U.S. 433):

> "This Court does not sit to decide arguments after events have put them to rest. United States v. Alaska Steamship Co., 253 U.S. 113, 116, 40 S. Ct. 448, 449, 64 L.Ed. 808."

Constitutional questions are not to be dealt with abstractly. *Local No. 8-6, Oil, Chemical and Atomic Workers Int'l v. Missouri,* 361 U.S. 363, 80 S. Ct. 391, 4 L.Ed. 2d 373 (1960). *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 92 S. Ct. 1716, 32 L.Ed.2d 317 (1972). Even intervening legislation can result in mootness requiring dismissal. *Aikens v. State of California,* 406 U.S. 813, 92 S. Ct. 1931, 32 L.Ed.2d 511, (1972).

**(2) The question presented on appeal was not timely raised.**

The pleading of Appellants as intervenors in the trial court is quite lengthy and attacks the bond validation statute on multiple grounds but even though the statute contains the bonding provision, the pleading contains no allegation to the effect that one of the intervenors is an indigent and unable to post bond.

In response to the City's renewed motion for bond (Tr. 119), one of the thirty-eight intervenors filed an affidavit of inability to post bond (Tr. 135), but no ruling was secured thereon.

In order to invoke the jurisdiction of this Court on appeal, the federal question must have been timely raised in the state court. *Quicksall v. People of the State of Michigan,* 339 U.S. 660, 70 S. Ct. 910, 94 L.Ed. 1188 (1950); *Edelman v. People of the State of California,* 344 U.S. 357, 73 S. Ct. 293, 97 L.Ed. 387 (1953).

**(3) The merits of the cases were decided on the basis of state law without expressly passing on any Federal question.**

The only decision on the merits was that of the trial court. The bases for decision are clearly and abundantly shown in the findings of fact and conclusions of law (reproduced Statement, 45-49). There is no mention of any Federal question. Under the provisions of Rule 298, Tex. Rules Civ. Proc., any party may request additional findings and conclusions; Appellants did not do so.

It has long been established and consistently held that where a state court judgment rests on independent and

adequate state grounds, this Court will decline to review the judgment. *Murdock v. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875). *McCoy v. Shaw,* 277 U.S. 302, 48 S. Ct. 519, 72 L.Ed. 801 (1928). *Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 90 L.Ed. 2092 (1945). *Wolfe v. State of North Carolina,* 364 U.S. 177, 80 S. Ct. 1482, 4 L.Ed.2d 1650 (1960).

The principle was recently stated in *Zacchini v. Scripps-Howard Broadcasting Company,* 433 U.S. 562, 97 S. Ct. 2849, 53 L.Ed.2d 965 (1977), where this Court wrote (433 U.S. 566):

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, Wilson v. Loew's Inc., 355 U.S. 597, 78 S. Ct. 526, 2 L.Ed.2d 519 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion.' Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S. Ct. 459, 463, 89 L.Ed. 789 (1945)."

Rule 16.1(b) of the Rules of this Court incorporates the principles to which reference has been made above and is clearly indicative of the right of the City of Austin to dismissal in this case.

**(4) The question urged on appeal has been so plainly foreclosed by decisions of this Court as to make further argument unnecessary.**

The only appellate opinion involved in this proceeding is that in Cause No. 14,267, an interlocutory appeal brought by the City of Austin asserting trial court error in refusal to set a damage bond under the provisions of § 8 of art. 717m-1 (Tex. Rev. Civ. Stat.). That opinion (reproduced Statement, 31-37) does focus on the question which Appellants assume to bring before this Court on appeal and determines it adversely to Appellants' argument.

At the outset, however, it is important to clarify the issue. Appellants' phraseology of the question is (Statement, 1):

> "Question: Is a state statute under which court access for defense of the right to vote is withheld because of the failure to post a $2 million prospective damage bond invalid on grounds of repugnancy to the Equal Protection guarantees of the Fifth and 14th Amendments to the Constitution of the United States?
>
> "Appellants expressly include in this question the subsidiary questions in which: (A) an indigent seeks court access and (B) the access sought includes a statutory right to appellate review."

The state statute, art. 717m-1, has nothing whatsoever to do with "the right to vote." Appellants' contention of a right to vote is based solely on a provision in the charter of the City of Austin. As a home rule city, Austin is controlled by art. XI, § 5 of the state constitution which specifies, in part, that:

> "[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. . . ."

Under that provision, obviously a state counterpart of the Supremacy Clause in the United States Constitution, the voter auhorization in the city charter was held to be invalid because of its inconsistency with art. 1112 of the Revised Civil Statutes of the State of Texas. That was the conclusion of the trial court in deciding the merits of the case (Supplemental Tr., 47-48).

The damage bond provision which Appellants attacked is included in the bond validation statute, art. 717m-1. The bond requirement was sustained by the Austin Court of Appeals which clearly rejected Appellants' contention that the indigency of one of the parties made the bond requirement invalid even as applied to an indigent. The holding was firmly based on this Court's most pertinent decisions.

In *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L.Ed.2d 626 (1973), this Court held that the forma pauperis statute is not available in bankruptcy and that the statutory requirement of payment of filing fees as a condition precedent to obtaining discharge in bankruptcy has a rational basis and does not deny indigents equal protection of the laws. That was a case in which the individual indigent was seeking something particular for himself. In the situation now before the Court, Appellants, merely because one of their number is an indigent, seek to avoid a statutory bond requirement which has a rational basis.

Another situation in which indigents were seeking relief particularly on their own account was before the Court in *Ortwein v. Schwab,* 410 U.S. 656, 93 S. Ct. 1172, 35 L.Ed.2d 572 (1973), reh. den. 411 U.S. 922. That case originated as a mandamus proceeding to compel the Oregon court of appeals to accept, without the payment of a filing fee, a petition for review of decisions of the state welfare division. Following the *Kras* decision, this Court held that (410 U.S. 660):

> "Appellants urge that the filing fee violates the Equal Protection Clause by unconstitutionally discriminating against the poor. As in Kras, this litigation, which deals with welfare payments, 'is in the area of economics and social welfare.' 409 U.S., at 446, 93 S. Ct., at 638; see Dandrige v. Williams, 397 U.S., at 485-486, 90 S. Ct., at 1161-1162. No suspect classification, such as race, nationality, or alienage, is present. See Graham v. Richardson, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852, 29 L.Ed.2d 53 (1971). The applicable standard is that of rational justification."

The due process clause does not require the state to provide for appellate review. This Court so noted (410 U.S. 660):

> "This Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system. McKane v. Durston, 153 U.S. 684, 687, 14 S. Ct. 913, 914, 38 L.Ed. 867 (1894); see Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L.Ed. 891 (1956); District of Columbia v. Clawans, 300 U.S. 617, 627, 57 S. Ct. 660, 663, 81 L.Ed. 843 (1937); Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L.Ed.2d 36 (1972)."

What Appellants here are actually seeking is a ruling that 38 citizens, merely because one of them is an indigent, may, without bond, indefinitely delay through appellate processes municipal funding authorized by state law, sustained by judicial decision, and based upon rational justification. The *Kras* and *Ortwein* decisions, in effect, determine the question contrary to Appellants' contention. No further argument should be necessary.

**(5) The questions presented are so wanting in substance as to need no further argument.**

Appellants' due process contentions are in reality complaints with regard to longstanding Texas Rules of Civil Procedure. Rule 434 authorizes a court of appeals to render the judgment or decree which the court below should have rendered. Ordering an opinion not to be published is authorized by Rule 452. The court's following of those rules was not violative of due process. The issues were not raised in the courts below, but even if they had been, they would not merit this Court's consideration. California statutes providing somewhat comparable procedures were sustained in *Martinis v. State of California,* 444 U.S. 277, 100 S. Ct. 553, 62 L.Ed.2d 481 (1980).

## CONCLUSION

Appellants have not fulfilled the requirements for this Court's jurisdiction and have presented no issue meritorious of this Court's ruling.

## PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee-Respondent, The City of Austin, Texas, prays that the cause be dismissed or the determinations of the state courts be affirmed.

Respectfully submitted,

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